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K Ramalingam a/l Krishnamoorthy & Ors v Mohammad Razin bin Abdullah (in his personal capacity and in his capacity as the Registrar of Societies) & Anor and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(IM)(NCVC)-303–08 OF 2016, W-02(IM)(NCVC)-1462–08 OF 2016, W-02(IM)(NCVC)-1463–08 OF 2016, W-02(IM)(NCVC)-1464–08 OF 2016 AND W-02(IM)(NCVC)-1465–08 OF 2016

TENGKU MAIMUN, NALLINI PATHMANATHAN AND ZABARIAH MOHD JJCA

D

10 JANUARY 2017

E

Civil Procedure — Fraud — Allegation of — Filing of fresh action based on ground that previous action tainted with fraud — Fresh action struck out — Whether trial judge addressed mind to issue of fraud — Whether setting aside warranted

F

Civil Procedure — Striking out — Whether facts in statement of claim disclosed prima facie case that required answer — Whether facts, taken cumulatively, 'obviously sustainable' for purposes of striking out application — Whether trial judge addressed mind to issue of whether facts underlying claim warranted investigation by way of full trial — Rules of Court 2012 O 18 r 19

G

The appellants ('the plaintiffs') appealed against the decision of the High Court in allowing the respondents' ('the defendants') applications to strike out the plaintiffs' claim under O 18 r 19 of the Rules of Court 2012 ('the ROC'). The plaintiffs were members of the Malaysian Indian Congress ('the MIC'). At the MIC's triennial party elections, the first defendant was elected unopposed as MIC's Deputy President. The second defendant later complained to the Central Working Committee ('CWC') that there were irregularities in the election but the same was dismissed by the latter. Several candidates for the election filed their complaints too to the Registrar of Societies ('the ROS'). Following the complaints, the ROS: (a) notified the MIC that there were various transgressions of the MIC Constitution, the By-Law Election and the provisions of the Societies Act 1966 ('the Act') ('the first impugned letter'); and (b) issued a notice under s 16(1) of the Act on the grounds that there was a dispute as to, inter alia, who were the committee members and Deputy President of the MIC ('the second impugned letter'). The ROS requested that the MIC produce evidence of the settlement of disputes and the proper

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appointment of the lawful office-bearers to him, as required by s 16(1) of the Act within the extended time. The MIC responded by, through its letter, making specific reference to the ROS's first and second impugned letters. According to MIC, there was an agreement between the MIC and the Prime Minister to hold fresh elections for all posts and at all levels. The ROS directed the MIC to hold re-elections ('the 2013 re-elections') of all office bearers. The 2013 re-elections were held and the first defendant was elected as President unopposed. Prior the 2013 re-elections, several members who were aggrieved by the decisions and directions of the ROS filed for judicial review applications at the High Court ('the JC applications'). The High Court judge ('the HCJ') granted leave for both applications to move the court for various reliefs, among others, a certiorari to quash the first, second and fourth impugned letters. The HCJ found that: (a) there was no mala fide and/or biasness on the part of the ROS in issuing the impugned letters; and (b) that the ROS had acted independently. Pursuant to the discovery of incriminating evidence, the plaintiffs brought a fresh action against the defendants, alleging conspiracy, fraud and fraudulent practices between the defendants in respect of the decisions and directions of the ROS. Vide the fresh action, the plaintiffs sought to set aside the orders of the HCJ in dismissing the JR applications as it was argued that there was fraud practised in the JR applications. The defendants applied to strike out the plaintiffs' claim under O 18 r 19 of the ROC on the grounds that: (a) the plaintiffs did not have locus to commence and maintain the suit because they were no longer members of the MIC; (b) the plaintiffs did suffer loss personally; (c) the claim was not justiciable under s 18C of the Act; (d) the plaintiff's claim was an abuse of the court process; (e) the issue of estoppel precludes the plaintiffs from seeking another chance to participate in the 2013 re-elections because the elected to not participate in the 2013 re-elections; (f) the elements of conspiracy have not been sufficiently particularised; and (g) there was no reasonable cause of action based on the pleadings. The striking out application was allowed. Hence, the present appeal.

Held, allowing the appeals with costs and setting aside the orders of the High Court:

(1) The plaintiffs' claim vide the fresh action was premised on s 44 of the Evidence Act 1950 ('the EA') which allowed a judgment of court to be impugned, inter alia, for fraud or collusion. Notwithstanding her reproduction of s 44 of the EA, the judge appeared to have focused on the party affairs and the 2013 re-elections rather than on the fact of whether fraud was practiced in the JR applications. The fresh action was not a plain and obvious case for striking out and the judge's error in failing to give due regard to the nature of the plaintiffs' claim under s 44 of the EA. The fresh action was remitted to the High Court for trial (see paras 57–58 & 77).

(2) Whether or not the plaintiffs were members or otherwise of MIC were irrelevant as the plaintiffs were seeking to impugn the JR applications premised on fraud or collusion perpetrated on the court. The issue of membership and the 2013 re-elections as well as part affairs were secondary to the primary issue of whether or not fraud has been committed on the court. Even assuming the issue of membership was relevant on the facts and circumstances of the instant case, the issue required mature consideration. More importantly, fraud was a matter to be established at trial (see paras 60–61).

(3) The argument that the plaintiffs have not suffered loss personally was irrelevant to the issue of whether a fraud or collusion has been perpetrated on the court. In any event, a claim shall not be defeated by misjoinder or non-joinder of parties and the judge appeared to have overlooked the fact that the plaintiffs' claim was premised on s 44 of the EA which entails a different consideration from the torts of conspiracy to injure (see para 62).

(4) Section 18C of the Act outs the jurisdiction of the court from determining any suit which seeks to challenge the validity of the decision of the MIC on matters relating to its party affairs. The plaintiffs' claim vide the fresh action did not relate to party affairs per se. It was far wider than that. It sought to challenge the judgment in the JR application on grounds of fraud. The question whether there was fraud or not did not involve the application of s 18C which related to internal disputed as regards party affairs. It was therefore mot whether s 18C comes into play at all. Furthermore, s 18C does not provide a statutory shield for fraud perpetrated on the court (see paras 64–65).

(5) The elements of conspiracy were adequately pleaded for purposes of s 44 claim. The salient facts have been fully set out in the statement of claim and the particulars of conspiracy were sufficient for the plaintiffs' purposes. In any event, it did not warrant the plaintiffs' claim being struck out for inadequate particulars (see para 67).

(6) The facts, as pleaded, disclosed a prima facie case that required an answer, particularly given that there was no denial of many of the salient facts. These fact, taken cumulatively, could not be said to be 'obviously sustainable' for the purposes of a striking out application. Although the judge had set out the facts, Her Ladyship failed to address her mind to the issue of whether the facts underlying the plaintiffs' claim warranted investigation by way of full trial. The approach of the judge in finding summarily that the incriminating evidence would not have influenced the decision in the judicial review applications was erroneous (see paras 69–70 & 74).

[Bahasa Malaysia summary

Perayu-perayu ('plaintif-plaintif') telah merayu terhadap keputusan Mahkamah Tinggi kerana membenarkan permohonan-permohonan responden-responden ('defendan-defendan') membatalkan tuntutan plaintif-plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KM'). Plaintif-plaintif merupakan ahli-ahli Kongres India Malaysia ('MIC'). Dalam pilihanraya parti setiap tiga tahun MIC, defendan pertama telah dipilih tanpa bertanding sebagai Timbalan Presiden MIC. Defendan kedua kemudian mengadu kepada Jawatankuasa Kerja Pusat ('JKP') bahawa terdapat luar aturan dalam pilihanraya itu tetapi yang sama telah ditolak oleh JKP. Beberapa calon untuk pilihanraya telah memfailkan aduan mereka juga kepada Pendaftar Pertubuhan ('PP'). Berikutan aduan-aduan tersebut PP telah: (a) memberitahu MIC bahawa terdapat pelbagai pelanggaran Perlembagaan MIC, Undang-Undang Kecil Pilihanraya dan peruntukan Akta Pertubuhan 1966 ('Akta tersebut') ('surat pertama yang dipersoalkan'); dan (b) mengeluarkan notis di bawah s 16(1) Akta tersebut atas alasan bahawa terdapat pertikaian berhubung, antara lain, yang merupakan ahli-ahli jawatankuasa dan Timbalan Presiden MIC ('surat kedua yang dipersoalkan'). PP memohon agar MIC mengemukakan keterangan tentang penyelesaian pertikaian itu dan pelantikan wajar pemegang jawatan sah kepadanya, sepertimana dikehendaki oleh s 16(1) Akta tersebut dalam masa yang dilanjutkan. MIC menjawab dengan, melalui suratnya, membuat rujukan khusus kepada surat-surat pertama dan kedua PP yang dipersoalkan itu. Menurut MIC, terdapat perjanjian antara MIC dan Perdana Menteri untuk mengadakan pilihanraya baru untuk semua jawatan dan di semua peringkat, PP mengarahkan MIC untuk mengadakan semula pilihanraya ('pilihanraya semula 2013') untuk semua pemegang jawatan. Pilihanraya semula 2013 itu telah diadakan dan defendan pertama telah dilantik sebagai Presiden tanpa bertanding. Sebelum pilihanraya semula 2013 itu, beberapa ahli yang terkilan dengan keputusan dan arahan PP telah memfailkan permohonan semakan kehakiman di Mahkamah Tinggi ('permohonan SK'). Hakim Mahkamah Tinggi ('HMT') telah memberikan kebenaran untuk kedua-dua permohonan untuk memohon mahkamah bagi pelbagai relif, antara lain, certiorari untuk mebatalkan surat-surat pertama, kedua dan keempat yang dipersoalkan itu. HMT mendapati bahawa: (a) tiada niat jahat dan/atau berat sebelah di pihak PP dalam mengeluarkan surat-surat yang dipersoalkan itu; dan (b) bahawa PP telah bertindak secara bebas. Berikutan penzahiran keterangan yang menuduh, plaintif-plaintif memulakan tindakan baru terhadap defendan-defendan, mendakwa konspirasi, fraud dan amalan fraud antara defendan-defendan berkaitan keputusan dan arahan PP. Melalui tindakan baru ini, plaintif-plaintif memohon untuk diketepikan perintah-perintah HMT yang menolak permohonan SK itu kerana ia dihujahkan bahawa terdapat fraud yang diamalkan dalam permohonan SK itu. Defendan-defendan memohon untuk membatalkan tuntutan plaintif-plaintif di bawah A 18 k 19 KM atas alasan bahawa: (a) plaintif-plaintif tidak

A mempunyai locus untuk memulakan dan mengekalkan guaman kerana mereka bukan lagi ahli-ahli MIC; (b) plaintif-plaintif telah mengalami kehilangan secara peribadi; (c) tuntutan itu tidak wajar di bawah s 18C Akta tersebut; (d) tuntutan plaintif merupakan penyalahgunaan proses mahkamah; (e) isu estopel menghalang plaintif-plaintif memohon satu lagi peluang untuk
B terlibat dalam pilihanraya semula 2013; (f) elemen konspirasi tidak dibutirkan secara mencukupi; dan (g) tidak ada kausa tindakan yang munasabah berdasarkan pliding. Permohonan pembatalan itu dibenarkan. Justeru, rayuan ini.

C **Diputuskan**, membenarkan rayuan-rayuan dengan kos dan mengetepikan perintah-perintah Mahkamah Tinggi:

(1) Tuntutan plaintif-plaintif melalui tindakan baru adalah berpremiskan s 44 Akta Keterangan 1950 ('AK') yang membenarkan penghakiman
D mahkamah dipersoalkan, antara lain, untuk fraud atau pakatan sulit. Walau apa pun pengemukaan semula beliau berhubung s 44 AK, hakim kelihatan fokus kepada urusan pihak dan pilihanraya semula 2013 daripada berhubungan fakta sama ada fraud telah diamalkan dalam permohoan SK itu. Tindakan baru bukan kes yang biasa dan jelas untuk
E pembatalan dan kekhilafan hakim kerana gagal memberi perhatian kepada sifat tuntutan plaintif-plaintif di bawah s 44 AK. Tindakan baru itu telah diremitkan kepada Mahkamah Tinggi untuk perbicaraan (lihat perenggan 57–58 & 77).

(2) Sama ada atau tidak plaintif-plaintif merupakan ahli-ahli atau sebaliknya
F kepada MIC adalah tidak relevan kerana plaintif-plaintif memohon untuk mempersoalkan permohonan SK berpremiskan fraud atau pakatan sulit yang dilakukan ke atas mahkamah. Isu keahlian dan pilihanraya semula 2013 dan juga bahagian urusan adalah sekunder kepada isu utama sama ada atau tidak fraud telah dilakukan ke atas
G mahkamah. Walau pun mengandaikan isu keahlian tidak relevan berdasarkan fakta dan keadaan kes ini, isu itu memerlukan pertimbangan sewajarnya, lebih penting, fraud adalah perkara untuk dibuktikan semasa perbicaraan (lihat perenggan 60–61).

H (3) Hujah bahawa plaintif-plaintif tidak mengalami kehilangan peribadi adalah tidak relevan kepada isu sama ada fraud dan pakatan sulit telah dilakukan ke atas mahkamah. Dalam apa keadaan, tuntutan tidak patut dikalahkan oleh kesalahcantuman atau tiada percantuman pihak dan hakim nampaknya telah terlepas pandang hakikat bahawa tuntutan
I plaintif telah berpremiskan kepada s 44 daripada AK yang melibatkan pertimbangan yang berbeza daripada tort konspirasi untuk mencederakan (lihat perenggan 62).

(4) Seksyen 18C Akta itu tidak memberikan bidang kuasa mahkamah daripada menentukan apa-apa guaman yang memohon untuk mancabar

kesahan keputusan MIC berhubung perkara-perkara berkaitan urusan pihaknya. Tuntutan plaintif melalui tindakan baru tidak berkaitan urusan pihak per se. Ia lebih luas daripada itu. Ia memohon untuk mencabar penghakiman dalam permohonan SK atas alasan fraud. Persoalan sama ada terdapat fraud atau tidak tidak melibatkan permohonan s 18C yang berkaitan pertikaian dalaman berkenaan urusan pihak. Ia dengan itu bukan sama ada s 18C terpakai langsung. Selanjutnya, s 18C tidak memperuntukkan perlindungan statutori untuk fraud yang dilakukan ke atas mahkamah (lihat perenggan 64–65).

(5) Elemen konspirasi telah dipli secukupnya bagi tujuan tuntutan s 44. Fakta penting telahpun dinyatakan dalam penyataan tuntutan dan butiran konspirasi adalah mencukupi bagi tujuan plaintif-plaintif. Dalam apa keadaan, ia tidak mewajarkan tuntutan plaintif-plaintif dibatalkan kerana butiran yang tidak mencukupi (lihat perenggan 67).

(6) Fakta-fakta itu, sepertimana yang diplikan, menunjukkan kes prima facie yang memerlukan jawapan, khususnya di mana tiada penafian terhadap fakta-fakta yang penting. Fakta tersebut, diambil secara kumulatif, tidak boleh dikatakan sebagai 'obviously sustainable' bagi tujuan membatalkan permohonan. Walaupun hakim telah menyatakan fakta-fakta itu, Yang Arif telah gagal menumpukan minda beliau kepada isu tentang sama ada fakta-fakta yang menjadi asas tuntutan plaintif-plaintif mewajarkan siasatan melalui perbicaraan penuh. Pendekatan hakim dalam mendapati secara terus bahawa keterangan yang menuduh tidak mempengaruhi keputusan dalam permohonan-permohonan semakan kehakiman itu adalah salah (lihat perenggan 69–70 & 74).]

Notes

For cases on fraud in general, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3875–3879.

For cases on striking out in general, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9203–9582.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382; [1986] CLJ Rep 45, SC (refd)

Anina Saadudia v Datuk Seri Tengku Adnan Tengku Mansor & Anor [2016] 1 MLRH 647, HC (refd)

Crofter Hand Woven Harris Tweed Co Ltd and Others v Veitch and Another [1942] 1 All ER 142; [1942] AC 435, HL (refd)

Datuk Pasamanickam & Anor v Agnes Joseph R Narayanan Samy v Agnes Joseph [1980] 2 MLJ 92, FC (refd)

Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors [1996] 3 MLJ 259, HC (refd)

Hip Foong Hong v H Neotia and Co [1918-19] All ER Rep Ext 1417; [1918] AC 888, PC (refd)
Lonrho plc and others v Fayed and others (No 5) [1994] 1 All ER 188, CA (refd)
Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd [2013] 4 MLJ 520; [2013] 8 CLJ 329, CA (refd)
Ng Hee Thoong & Anor v Public Bank Berhad [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (refd)

Legislation referred to

Evidence Act 1950 s 44
Rules of Court 2012 O 15 r 6, O 18 r 19
Societies Act 1966 ss 13(1)(c)(ix), 16(1), 18C

Appeal from: Civil Suit No WA-22NCVC-70–02 of 2016 (High Court, Kuala Lumpur)

David Mathews (Prakash Lachimanan, Ari Lachman, Kumar and Malarvily Perumal with him) (Mathews Hun Lachimanan) for the appellants.
Gopal Sri Ram (CK Lim, Balbir Singh, David Yii and Ong Kim Hong with him) (Najiana Wan Balbir) for the first respondent.
Kamarul Hisham Kamaruddin (Mohd Ruzaini Zulkifli, Vasanthi, Raja Segaran and Nor Farazidah with him) (Vas & Co) for the second and sixth respondents.
Ho Hon Keong (Ho & Ho) for the third, fourth and fifth respondents.
Amarjeet Singh (Senior Federal Counsel, Attorney General's Chambers) for the seventh and eighth respondents.

Tengku Maimun JCA (delivering judgment of the court):

[1] These appeals were brought by the appellants ('the plaintiffs') against the decision of the High Court in allowing the respondents' ('the defendants') applications to strike out the plaintiffs' claim under O 18 r 19 of the Rules of Court 2012.

THE BACKGROUND FACTS

[2] The plaintiffs were all members of the Malaysian Indian Congress ('MIC'), a political party that is registered under the Societies Act 1966 ('the Act').

[3] Subramaniam a/l Sathasivam ('the first defendant'), S Vigneswaran a/l M Sanasee ('the second defendant'), Jaspal Singh a/l Gurbakhes Singh ('the third defendant'), Mohan a/l Thangarasu ('the fourth defendant') and Sakhtivel a/l Alagappan ('the fifth defendant') are office-bearers of the MIC.

Vasanthi a/p Arumugam ('the sixth defendant') is an advocate and solicitor who acted for the second defendant. Mohammad Razin bin Abdullah ('the seventh defendant') is the Registrar of Societies ('ROS') while Akmal Yahya ('the eighth defendant') is a police officer seconded to the office of the ROS as an investigating officer.

[4] At the MIC's triennial party elections held on 30 November 2013 ('the 2013 elections'), G Palanivel a/l K Govindasamy ('Palanivel') and the first defendant were elected unopposed as MIC's President and Deputy President respectively.

[5] The posts of the three vice presidents were won by M Saravanan together with one Sothinathan a/l Sinna Goundar ('Sothi') and one Balakrishnan a/l V Sinniah ('Bala').

[6] The second, third, fourth defendants, SK Devamany and one S Selvarajah a/l Chinnasamy were all unsuccessful in their bids to be elected as Vice Presidents of the MIC.

[7] K Ramalingam a/l Krishnamoorthy ('the first plaintiff') and one Pakas a/l Rao ('Pakas') were elected as members of the Central Working Committee ('the CWC'). The first plaintiff was subsequently appointed as the Strategic Director of the MIC whilst Pakas was appointed as the Secretary General of the MIC replacing the fifth defendant.

[8] On 5 December 2013, the election committee of the 2013 elections prepared a report with regard to the conduct, management and results of the 2013 elections ('the report'). The report was delivered to the CWC to be tabled at its next meeting.

[9] On 6 December 2013, the second defendant complained to the CWC about the alleged irregularities in the 2013 elections. At the meeting of the CWC on 6 February 2014, the CWC dismissed all complaints relating to the 2013 elections. The CWC also deliberated upon and accepted the report at the said meeting.

[10] Between 10 January 2014 and 2 December 2014, several candidates for the 2013 elections (including the defendants) had lodged complaints with the ROS regarding the 2013 elections, alleging transgressions of the MIC's Constitution, the MIC Election By-Laws 2003 and provisions of the Act.

[11] Following the complaints, the ROS issued letters dated 5 December 2014, 31 December 2014, 6 January 2015 and 6 February 2015 to the MIC.

The letters which were all signed by the seventh defendant contained decisions and directions of the ROS pertaining to the 2013 elections.

[12] Vide the letter dated 5 December 2014 ('the first impugned letter'), the ROS notified the MIC that there were various transgressions of the MIC Constitution, the MIC By-Law Election and the provisions of the Act in the 2013 elections and requested the MIC to remedy these transgressions, resolve the dispute or conduct limited elections of the affected posts.

[13] In the letter dated 31 December 2014 ('the second impugned letter'), the ROS gave the following notice under s 16(1) of the Act to the MIC:

> JPPM dengan ini menyampaikan notis yang dikeluarkan di bawah seksyen 16(1) Akta Pertubuhan 1966 (Akta 335), notis yang mana secara nyata memberitahu MIC bahawa JPPM berpendapat satu pertikaian telah timbul dalam parti MIC berhubung siapakah pemegang Ahli Jawatankuasa Parti MIC di beberapa cawangan, beberapa bahagian, Naib Presiden, Ahli Jawatankuasa Kerja Pusat (CWC).

[14] The MIC was directed to settle the dispute as follows:

> MIC dikehendaki menyelesaikan sepenuhnya pertikaian ini dalam jangka masa 30 hari untuk pertikaian melibatkan cawangan, 60 hari untuk pertikaian melibatkan peringkat Bahagian dan 90 hari untuk Naib Presiden dan Jawatankuasa Kerja Pusat (CWC) dari tarikh 5/12/2014.

[15] The ROS cautioned that if the MIC failed to comply with the s 16(1) notice, he would, upon the expiry of 90 days from 5 December 2014, issue a notice for the cancellation of MIC's registration pursuant to s 13(1)(c)(ix) of the Act.

[16] In its reply vide a letter dated 2 January 2015, the Secretary General of MIC while asserting without prejudice the MIC's right in the matter, requested for an extension of time to settle the disputes within 60, 90 and 120 days respectively from 31 December 2014, which was the date of the s 16(1) notice to the MIC, instead of 5 December 2014.

[17] The ROS granted the extension of time vide his letter dated 6 January 2015 ('the third impugned letter') and requested that the MIC produce evidence of the settlement of the disputes and the proper appointment of the lawful office-bearers to him as required by s 16(1) of the Act within the extended time.

[18] The MIC's response came through its letter dated 5 February 2015. Making specific reference to the ROS's first and second impugned letters, the

MIC, through Palanivel admitted and notified the ROS of an agreement between the MIC and the Prime Minister to hold fresh elections for all posts and at all levels. In view of the agreement, the ROS was requested to withdraw the s 16(1) notice and the first impugned letter.

[19] The ROS responded vide a letter dated 6 February 2015 ('the fourth impugned letter'). By the fourth impugned letter, the MIC was directed to hold re-elections ('2013 re-elections') of all of its office bearers, to be conducted and managed by the elected members of the 2009 CWC.

[20] The 2013 re-elections were held sometime between July 2015 and December 2015 where the first defendant was elected as President of the MIC unopposed. The second, third and fourth defendants who were unsuccessful in the 2013 elections were elected as vice presidents while the fifth defendant was appointed as Secretary General of the MIC.

THE JUDICIAL REVIEW APPLICATIONS

[21] Prior to the 2013 re-elections, several members who were aggrieved by the decision and directions of the ROS filed judicial review applications in the Kuala Lumpur High Court. The first application was filed by the first plaintiff who commenced Judicial Review Application No R2–25–37–02 of 2015 ('JR 37'). The second Judicial Review Application R2–25–39–02 of 2015 ('JR 39') was filed by Pakas, Palanivel, Sothi and Bala.

[22] The High Court granted leave for both JR applications to move the court for various reliefs among others a certiorari to quash the first, the second and the fourth impugned letters.

[23] Several grounds were mounted to challenge the decisions/directions of the ROS, one of which was that the ROS did not act independently and was biased/mala fide in issuing the directions.

[24] Asmabi J (as she then was) heard JR 37 and JR 39 together. She found among others that there was no mala fide and/or biasness on the part of the ROS in issuing the impugned letters; that the ROS had acted independently and that the applicants themselves had communicated to the ROS on how they proposed to resolve the dispute with regard to the proper appointment of the lawful office bearers. According to Her Ladyship, the MIC's letter dated 5 February 2015 informing ROS of the MIC's agreement to hold re-elections for all posts at all levels completed the factual matrix and explained the action of the ROS in making the directions stated in the letter dated 6 February 2015. The JR applications were consequently dismissed.

[25] No appeal against the order of Asmabi J was filed in respect of JR 37. As regards JR 39, the order of Asmabi J was affirmed by this court and the application for leave to appeal to the Federal Court was dismissed.

INCRIMINATING EVIDENCE

[26] Since the decision of Asmabi J, copies of several emails were delivered to the first plaintiff. Of relevance were two emails, one was dated 5 January 2015 ('the first email') and the other, dated 19 February 2015 ('the second email').

[27] The first email emanated from the sixth defendant, who is practising under the name and style of Vas & Co ('the firm'). The sixth defendant and the firm had acted for the second defendant who intervened in the judicial review applications. The first email was sent by the sixth defendant to the second defendant and was copied to edmundbalthazar@yahoo.com. Enclosed was a draft letter ('the draft') meant to be a response by the ROS to the MIC. The draft was in fact transcribed onto the ROS's letterhead and sent to MIC as the third impugned letter.

[28] The second email was also sent by the sixth defendant to the second defendant. Annexed to the second email was a document described as 'Synopsis MIC-JPPM' ('the synopsis'). The second email was then separately forwarded by the second defendant to both the first defendant and the eighth defendant on 19 February 2015.

[29] The second defendant had also sent the first and the second emails to one Ramanan a/l Ramakrishnan ('Ramanan') on 6 January 2015 and 20 February 2015 respectively. Ramanan was the former Treasurer General of MIC and member of the 2013 CWC. There were also text messages exchanged between Ramanan and the second defendant and between Ramanan and the eighth defendant.

THE FRESH ACTION

[30] The discovery of the incriminating evidence brought about the filing of a Civil Suit No WA-22NCVC-70–02 of 2016 by the plaintiffs against the defendants ('the fresh action'). The plaintiffs alleged conspiracy, fraud and fraudulent practices between the defendants in respect of the decisions and directions of the ROS.

[31] Vide the fresh action the plaintiffs are essentially seeking to set aside the orders of Asmabi J in dismissing the JR applications on the ground that the

court at the time of hearing the applications was not cognisant of the fraudulent and corrupt practices involving the ROS which led to the four impugned letters being issued.

[32] The plaintiffs seek to impeach the orders of the court in JR 37 and JR 39 by relying on s 44 of the Evidence Act 1950 ('the EA').The statement of claim of the fresh action pleaded among others, that subsequent to receiving the emails, the first plaintiff confronted Ramanan who admitted and confided that:

(a) the first, the second, and the third, fourth, fifth defendants or any two or more of them or such others (the Subra faction) conspired together and were aligned to each other and had schemed to depose Palanivel as President of the MIC and for the first defendant to succeed him and further for the second, third and fourth defendants to depose and succeed the three vice presidents elected at the 2013 elections. Additionally, Pakas was to be deposed as secretary general and be succeeded by the fifth defendant ('the objectives/the scheme');

(b) the first defendant and/or the second defendant took active steps to enlist the seventh and the eighth defendants in the scheme to cause the ROS to issue the impugned letters which had the result of ensuring the 2013 re-elections took place;

(c) the third defendant falsely represented to the ROS that there were improperly constituted new branches which were allowed to participate in the 2013 elections which were accepted by the fifth defendant in his capacity as the Secretary General of MIC at the material time. The false representation by the third defendant was calculated to engineer the need to call for the re-election of the president's post in order for the first defendant to contest.

(d) the objective of the scheme was to undermine the 2013 elections results and to wrest control of the top posts and decision making organs of the MIC into the hands of the first defendant's/Subra's faction; and

(e) Ramanan was recruited to assist in the scheme by both the second and the first defendants. He was tasked to sway support away from Palanivel and his faction.

[33] It was also pleaded that Ramanan had admitted and confided in the first plaintiff that he became privy (after the fact) to information and communication which confirmed that:

(a) the sixth defendant was allowed to draft all letters for the ROS to send to the MIC in relation to the complaints regarding the 2013 elections; and

(b) the sixth defendant prepared the synopsis for the ROS to justify its decision and directions taken in the various letters that the ROS sent to the MIC.

[34] The plaintiffs further pleaded that Ramanan showed the first plaintiff some text messages on his mobile phone which he claimed was sent by the second defendant to him which suggested that the second defendant had already compromised the seventh defendant by corrupt means to ensure the objectives/scheme succeeds.

[35] The plaintiffs thus contended that the decisions and/or directions by the ROS was stage-managed to achieve the objectives, a re-election and results favouring the first defendant's faction and was therefore tainted by corrupt practices, prejudice and bias.

[36] The following are the reliefs sought by the plaintiffs in the fresh action:

(i) a declaration that the defendants or any two or more of them or such other persons conspired and combined together to improperly and unlawfully achieve the objectives through the scheme (to dispose some of the office bearers of the MIC);

(ii) further and/or in the alternative, a declaration that the sixth, seventh and eighth defendants have dishonestly assisted and/or aided and abetted and/or were accessories to the first to fifth, seventh and eighth defendants in facilitating the scheme as alluded therein;

(iii) a declaration that the order dated 15 June 2015 dismissing applications JR 37 and 39 be set aside;

(iv) consequent to granting of reliefs (i)–(iii) above or any of them:

(a) the 2013 re-elections of the MIC be declared illegal, null and void and of no effect and be set aside in toto;

(b) an order that fresh elections be held for all the MIC's office bearers on such terms and in such manner as may be deemed fit and proper by this honourable court;

(c) an order for the defendants and each of them indemnify the MIC for all costs and expenses incurred in connection with or howsoever otherwise arising by reason of the 2013 re-elections and the fresh elections sought herein;

(d) an order for the defendants and each of the defendant to indemnify the first plaintiff for all costs and expenses incurred in connection with JR 37 or otherwise howsoever arising by reason of the dismissal of JR 37;

(e) damages; and

(f) interest and costs.

[37] The defendants vide their respective statement of defence, deny the plaintiffs' allegations and put the plaintiffs to strict proof. The second defendant and the sixth defendant in their respective statement of defence however admitted that the synopsis was prepared by the sixth defendant. They nevertheless deny that the synopsis was to assist the ROS to justify its decisions and directions. The seventh defendant on the other hand pleaded that he never needed any synopsis.

[38] The defendants had also pleaded that the plaintiffs have no locus standi to commence, maintain and continue the fresh action and that the reliefs sought are non-justiciable.

THE STRIKING OUT APPLICATIONS

[39] By five separate applications, the defendants applied to strike out the plaintiffs' claim under O 18 r 19 of the Rules of Court 2012. The grounds for the striking out applications may be summarised as follows:

(a) the plaintiffs have no locus standi to bring the fresh action;

(b) the plaintiffs have not suffered loss personally;

(c) the alleged conspiracy as pleaded in the statement of claim has no nexus with the decision of the MIC to hold the 2013 re-elections for all posts and positions;

(d) the decision of the MIC to hold the 2013 re-elections is non-justiciable;

(e) abuse of process of the court;

(f) estoppel on the plaintiffs;

(g) elements of conspiracy have not been sufficiently particularised; and

(h) no reasonable cause of action based on the pleadings.

Locus standi

[40] The learned judge found that the plaintiffs' case is founded on the allegation that they are members of the MIC and they have been aggrieved by the purported conspiracy, fraud, collusion and other wrongdoings of the defendants. However, the plaintiffs are no longer members of the MIC.

[41] Pursuant to articles 91 and 15.6 of the MIC Constitution, the first plaintiff ceased to be a member when he resorted to court proceedings for the

matter in JR 37 without first referring it to the CWC. The first, second, third, fourth, seventh and eighth plaintiffs are no longer members of the MIC as they had failed to renew their membership by paying their annual subscription to the MIC pursuant to articles 12.2 and 12.2(a) of the MIC Constitution.

[42] As for the fifth and sixth plaintiffs, they ceased to be members of MIC the moment they filed the fresh action in respect of the affairs of the MIC without first referring the matter to CWC. In so deciding, the learned judge agreed with the rationale set out in *Datuk Pasamanickam & Anor v Agnes Joseph R Narayanan Samy v Agnes Joseph* [1980] 2 MLJ 92 (*Pasamanickam*) that members of a registered society, including the plaintiffs are bound by its rules. Her Ladyship therefore was not satisfied that the plaintiffs have any locus standi to institute the fresh action. The learned judge ruled that on the ground of locus standi alone, the plaintiffs' action ought to be struck out as prayed by the defendants.

[43] The learned judge further held that without locus standi as members of the MIC, the plaintiffs are not entitled to the declaratory reliefs. Her Ladyship noted that in addition to the prayers for declarations and setting aside the orders dismissing JR 37 and JR 39, the plaintiffs are seeking the consequential reliefs which include a declaration that 'the 2013 re-elections be declared illegal, null and void' and 'an order that fresh elections be held for all the MIC office-bearers'. All the reliefs sought by the plaintiffs revolve around, or are centred on the MIC and its party elections.

[44] The learned judge opined that the process of the court should not be abused by the plaintiffs to obtain declarations on the MIC when the plaintiffs now have nothing to do with the said party. The learned judge further noted that the first to the sixth defendants are all sued in their personal capacities, and not as office-bearers of the MIC, or as representatives of the MIC. If the court orders fresh re-elections, it is the MIC, ie the party itself that should rightfully hold the fresh re-elections. Therefore, the fatal flaw in the plaintiffs' case is that the MIC is not made a party to the suit.

The plaintiffs have not suffered loss personally

[45] The learned judge found that the plaintiffs' claim was founded on the tort of conspiracy to injure which requires the plaintiff to establish actual pecuniary loss. The plaintiffs have not suffered loss personally. The loss or damage as alleged by the plaintiffs are suffered by the MIC but MIC is not a party to the suit. The plaintiffs therefore do not have a reasonable cause of action and where a plaintiff does not have a reasonable cause of action, the plaintiff's suit is vexatious and frivolous and an abuse of the court process.

The alleged conspiracy as pleaded in the statement of claim has no nexus with the decision of the MIC to hold the 2013 re-elections for all posts and positions

[46] The learned judge found that the decision to hold the 2013 re-elections was made by the MIC. The MIC itself has agreed to hold re-elections for the president's post even before the ROS's letter dated 6 February 2015 was issued. This fact, according to the learned judge, demolishes the alleged new evidence of the plaintiffs which say that the contents of the letter dated 6 February 2015 were contrived to engineer the re-elections of the president's post so that the first defendant could contest.

[47] Her Ladyship further found that the alleged fraud and new evidence of the plaintiffs would not have any impact whatsoever on the decision of Asmabi J to dismiss JR 37 and JR 39 as it is clear that the decision to hold the re-elections is a party decision made by the MIC itself. The learned judge was of the opinion that the plaintiffs do not have a reasonable prospect of success by introducing the alleged new evidence and crying conspiracy and fraud by the defendants.

The decision to hold the 2013 re-elections is non-justiciable

[48] On this ground, the learned judge found that the plaintiffs are in effect challenging the decision of the MIC to hold the 2013 re-elections and are seeking an order to nullify the results of the re-elections. The plaintiffs' action is an action regarding party affairs which is caught by the provisions of s 18C of the Act and hence the court has no jurisdiction to entertain the plaintiffs' action.

Abuse of process of the court

[49] The learned judge found that the effect of the decision of Asmabi J as affirmed by this court is that the results of the 2013 re-elections are preserved and that the plaintiffs appear to have commenced the fresh action for a collateral purpose. The plaintiffs are basically seeking to depose the office-bearers at the branch, division and national levels who had been elected in the 2013 re-elections and who are not parties to the fresh action. By the non-joinder of these persons who may be affected or prejudiced by any decision made by the court, Her Ladyship held that the fresh action was an abuse of the process of the court.

Estoppel on the plaintiffs

[50] Since the plaintiffs have on their own accord elected not to participate in the 2013 re-elections, the learned judge ruled that they are now estopped

from seeking another chance to participate in the fresh re-elections, if so ordered by the court. Her Ladyship found that the plaintiffs are using the court to gain political advantage and are seeking a second bite of the cherry.

The elements of conspiracy have not been sufficiently particularised

[51] The learned judge noted that from the pleadings, the elements of conspiracy as stipulated by Viscount Simon LC in *Crofter Hand Woven Harris Tweed Co Ltd and Others v Veitch and Another* [1942] 1 All ER 142; [1942] AC 435 ('*Tweed*') have not been sufficiently particularised. The plaintiffs have not pleaded or shown how the alleged conspiracy of the defendants had injured them. Neither have the plaintiffs pleaded the damage suffered by them, ie the actual pecuniary loss caused by the defendants' tort of conspiracy as required in *Lonrho plc and others v Fayed and others (No 5)* [1994] 1 All ER 188. If at all any loss or damage has been suffered, it was for the past president, three vice presidents and the Secretary General of the MIC to make such a claim. However they have not deemed it fit to institute the fresh action. The learned judge concluded that the plaintiffs do not have a bona fide plea of damage and hence they do not have a reasonable cause of action.

No reasonable cause of action based on the pleadings

[52] Further to the grounds set out above, the learned judge, having cited *Tweed* and *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259 found that the plaintiffs have failed to fulfil the requirement to plead conspiracy with great particularity and the requirement to establish the acts done in execution of the agreement resulted in damage to the claimant, failing which the claim is liable to be struck out.

[53] The learned judge then went on to consider the ROS's letter dated 31 December 2014 wherein Her Ladyship held that even if the allegations of conspiracy in relation to the 31 December 2014 letter are assumed to be true, it does not amount to a reasonable cause of action. The letter only required the MIC to hold re-elections for the specific branches, divisions and positions held to be in dispute by the ROS, whereas the 2013 re-elections sought to be impugned by the plaintiffs is based on a call for a re-election at all levels. The plaintiffs have therefore failed to prove a causative link between the ROS's letter dated 31 December 2014 (which the plaintiffs have pleaded to be their particulars of the alleged conspiracy in para 59 of the statement of claim) and the impugned 2013 re-elections as required in *Tweed*.

[54] The learned judge concluded that the plaintiffs have no reasonable cause of action against the defendants which merit a full trial and was satisfied

that the plaintiff's claim is obviously unsustainable. The defendants' applications were allowed, hence the appeals by the plaintiffs.

THE APPEALS

[55] Learned counsel for the plaintiffs emphasised that there was fraud practised on the court in the judicial review proceedings where Asmabi J had decided on the basis that the ROS was impartial and independent whereas the incriminating evidence would show that the letters issued by the ROS were in fact prepared by the sixth defendant on the instructions of the second defendant and which were then forwarded to the eighth defendant to be issued on ROS's letterhead. The plaintiffs contended that the ROS was illicitly working hand in glove with the sixth defendant and the second defendant (from Subra's faction) to assist them in the scheme. Learned counsel submitted that there was fraud and corrupt practices by the defendants in pursuance of an unlawful scheme which was designed to depose Palanivel and to secure the nullification of the 2013 elections.

[56] For ease of reference we reproduce the relevant parts of Asmabi J's grounds of judgment:

> 57. It was also the contention of the applicants that the said letters ought to be quashed by this court as in issuing the said letters and/or when forming the opinion that there are disputes in the MIC based on the complaints made by members of the MIC the ROS merely acted on the bare complaints. Having examined the affidavits in reply filed by the ROS ... I am satisfied that the ROS had not acted on bare complaints as alleged by the applicants but he had acted on the documentary complaints presented to him by members of the MIC. Upon receipt of these complaints he then directed for investigation to be carried out to confirm the allegations and only after considering the results of the investigation that the ROS came to the opinion that disputes existed in the MIC ...
>
> 58. It is obvious in this case that the ROS had conducted investigation into the alleged complaints by the members of the MIC and had satisfied himself that there were disputes as to the legally constituted office bearers of the MIC. Therefore, it was wrong for the applicant to claim that the ROS had acted on bare complaints. ROS had in fact conducted his own investigation into the complaints before causing the first and second impugned letters to be issued to the MIC.

OUR DECISION

[57] The plaintiffs' claim vide the fresh action is premised on s 44 of the EA which allows a judgment of the court to be impugned, inter alia, for fraud or collusion. Section 44 reads:

> 44 Fraud or collusion in obtaining judgment or incompetency of court may be proved
>
> Any party to a suit or other proceeding may show that any judgment, order or

A decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.

B **[58]** At the outset, we observe that notwithstanding her reproduction of s 44, the learned judge appears to have focussed on the party affairs and the 2013 re-elections rather than on the fact of whether fraud was practiced on the court in JR 37 and JR 39.

C *Ground (i): The plaintiffs have no locus to commence and maintain the suit because they are no longer members of the MIC*

[59] The learned judge relied on *Pasamanickam* to hold that the plaintiffs have no locus to institute the fresh action. In *Pasamanickam*, the respondent
D successfully sought a declaration that the annual general meeting of Parit Bakar branch of the MIC was unconstitutional, unlawful, ineffective and null and void. On appeal, the Federal Court allowed the appeal. Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) stated that the relationship between the MIC and its members is based on contract and the terms of the contract as
E embodied in the MIC Constitution (which forbids members from resorting to court proceedings in matters relating to their rights, obligations, duties and privileges unless and until such matters are first referred to the CWC) will prima facie be binding on the parties.

F **[60]** With respect, on the facts and circumstances of the fresh action, we find learned judge's reliance on *Pasamanickam* misplaced. In our view, whether or not the plaintiffs are members or otherwise of MIC are irrelevant as the plaintiffs are seeking to impugn JR 37 and JR 39 premised on fraud or collusion perpetrated on the court. The issue of membership and the 2013
G re-elections as well as party affairs are secondary to the primary issue of whether or not fraud has been committed on the court. Even assuming the issue of membership is relevant on the facts and circumstances of the instant case, we are further of the view that the issue requires mature consideration.

H **[61]** More importantly, fraud is a matter to be established at trial. Suffice to quote the following from *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1 which similarly concerns a striking out application where Ramly Ali FCJ said at p 19 (MLJ); pp 15–16 (CLJ):

I

> [44] ... The question as to whether the fraud referred to in s 44 of the Act speaks about 'intrinsic or extrinsic' fraud is an issue of law that requires lengthy argument and mature consideration at trial. It is no part of the court's function at this stage of the litigation to decide difficult question of law which call for detailed argument and mature considerations ...

> [45] In *Wyatt v Palmer* [1899] 2 QB 106 the English Court of Appeal dealt with an application to strike out an earlier judgment on the ground of fraud. Lindley MR in that case concluded that 'This is not a case in which the action ought to be summarily stopped ... As a general proposition I think it is dangerous and undesirable to summarily stop an action to set aside a judgment on the ground that it has been obtained by fraud'.

Ground (ii): The plaintiffs have not suffered loss personally

[62] The learned judge found that the plaintiffs have not suffered loss personally and that if at all, it was the MIC who suffered loss but MIC is not made a party. Similarly, we are of the view that this ground is irrelevant to the issue of whether a fraud or collusion has been perpetrated on the court. In any event, a claim shall not be defeated by misjoinder or non-joinder of parties (see O 15 r 6 of the Rules of Court 2012) and the learned judge appears to have overlooked the fact that the plaintiffs' claim is premised on s 44 of the EA, which entails a different consideration from the tort of conspiracy to injure.

Ground (iii): The claim is not justiciable under s 18C of the Societies Act 1966

[63] Section 18C provides:

> Decision of political party to be final and conclusive 18C. The decision of a political party or any person authorized by it or by its constitution or rules or regulations made thereunder on the interpretation of its constitution, rules or regulations or on any matter relating to the affairs of the party shall be final and conclusive and such decision shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any ground, and no court shall have jurisdiction to entertain or determine any suit, application, question or proceeding on any ground regarding the validity of such decision.

[64] Section 18C outs the jurisdiction of the court from determining any suit which seeks to challenge the validity of the decision of the MIC on matters relating to its party affairs. The plaintiffs' claim vide the fresh action does not relate to party affairs per se. It is far wider than that. It seeks to challenge the judgment in JR 37 and JR 39 on grounds of fraud. Once again, the focus by the learned judge ought to be whether the judgment in those JR proceedings was obtained by fraud. The question whether there was fraud or not does not involve the application of s 18C which relates to internal disputes as regards party affairs. It is therefore moot whether s 18C comes into play at all. The case of *Anina Saadudia v Datuk Seri Tengku Adnan Tengku Mansor & Anor* [2016] 1 MLRH 647) relied upon by the learned trial judge to hold that the court has no jurisdiction to entertain the plaintiffs' claim was not concerned with s 44 of the EA.

[65] Even if we are incorrect in so holding, a purposive approach to s 18C discloses that it does not preclude the court from investigating corrupt practices of a political party or any wrongdoings of a party as is alleged by the plaintiffs in their claim. Therefore s 18C does not provide a statutory shield for fraud perpetrated on the court (see *Hansard* for the second reading of the Societies (Amendment) Act 1990 [Act A743]).

Ground (iv): The plaintiffs claim is an abuse of process of the court because they are trying to reverse the results of 2013 re-elections

Ground (v): The issue of estoppel precludes the plaintiffs from now seeking another chance to participate in the fresh re-elections because they had elected not to participate in the 2013 re-elections

[66] In respect of grounds (iv) and (v) we are of the view that they are also irrelevant for the same reasons, namely that the plaintiffs seek to impugn a judgment of the court on the grounds of actual fraud and corrupt practices. These grounds cannot be used to oust the plaintiffs' claim and cannot form the basis to dismiss the plaintiffs' claim summarily.

Ground (vi): The elements of conspiracy have not been sufficiently particularised

[67] As regards ground (vi), we find that the elements of conspiracy have been adequately pleaded for purposes of a s 44 claim. The salient facts have been fully set out at paras 50–67 of the statement of claim and the particulars of conspiracy are sufficient for the plaintiffs' purposes. In any event, it does not warrant the plaintiffs' claim being struck out for inadequate particulars. We respectfully adopt the following passage in *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520; [2013] 8 CLJ 329 where Abdul Malik Ishak JCA said at pp 357–358 (MLJ); p 350 (CLJ):

> [52] It must be borne in mind that pleadings must be hopeless, baseless or without foundation in law or in equity or an abuse of the process of the court before they can be struck out under O 18 r 19 of the RHC. According to the case of *Harris Mohd Salleh v The Returning Officer (Ismail Majin) & Ors* [2000] 3 MLJ 434; [2000] 4 CLJ 104, an application for striking out based on the ground of insufficient particulars cannot be a good reason for striking out. It is trite that where the pleadings are defective and the opposing party seeks to strike out the pleadings, the court must be wary and ought not to act summarily if an amendment can correct the defect ...

[68] Further, we observe that *Tweed* was decided after a trial and *Gasing Heights* does not involve the issue of fraud perpetrated on the court.

Ground (vii): No reasonable cause of action based on the pleadings

[69] As for ground (vii), the facts as pleaded discloses a prima facie case that requires an answer, particularly given that there is no denial of many of the salient facts. These facts taken cumulatively cannot be said to be 'obviously unsustainable' for the purposes of a striking out application (see *Seruan Gemilang*).

[70] In this context, the learned judge, although had set out the facts, failed to address her mind to the issue of whether the facts underlying the plaintiffs' claim warranted investigation by way of a full trial. Her Ladyship with respect erred in focussing on the issues of re-elections and internal party affairs instead of focussing on whether the plaintiffs' claim discloses a reasonable cause of action for fraud and collusion under s 44 of the EA.

[71] To recapitulate, Asmabi J found that the seventh defendant had conducted his own investigations and had acted independently before issuing the impugned letters. However, the incriminating evidence disclosed among others that the letter issued by the seventh defendant to the MIC dated 6 January 2015 was in fact drafted by the sixth defendant on the instructions of the second defendant. As for the text messages, they disclosed communication not only between the second defendant and Ramanan but between Ramanan and the eighth defendant. The plaintiffs contend that the text messages exchanged between Ramanan and the eighth defendant shows that the eighth defendant was partisan in favour of the first defendant's faction (see text messages between the second defendant and Ramanan at p 206: common core bundle Vol 2 Tab 24; text messages between the eighth defendant and Ramanan at exh PRM 19 p 828 *Bhgn C* (2/4) at appeal record No 1462).

[72] It is pertinent to note that the second, the sixth and the eighth defendants have not affirmed any affidavit in the striking out proceedings to controvert the emails or the text messages (see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; [1986] CLJ Rep 45; *Ng Hee Thoong & Anor v Public Bank Berhad* [1995] 1 MLJ 281; [1995] 1 CLJ 609).

[73] The learned judge found that the ROS's letter dated 6 February 2015 merely echoed the MIC's letter dated 5 February 2015 and that the said MIC's letter demolishes the new incriminating evidence or any allegation of fraud. Her Ladyship further found that the incriminating evidence would not have influenced the decision in JR 37 and JR 39, as in dismissing the JR applications Asmabi J found that the MIC itself has agreed to hold the re-elections.

[74] With respect, the approach of the learned judge in finding summarily that the incriminating evidence would not have influenced the decision in JR 37 and JR 39 was erroneous and against the judgment of the Federal Court in *Seruan Gemilang* wherein at p 16, it was held that:

> whether it would have an important influence on the result of the trial, and whether it is presumably to be believed, are purely questions of facts which can only be determined at full trial where witnesses can be called to testify and be cross-examined to establish the truth, but not by way of affidavits evidence at the stage of summary proceedings of striking out under O 18 r 19 as applied for by the appellant.

[75] And as stated by Lord Buckmaster in *Hip Foong Hong v H Neotia and Co* [1918-19] All ER Rep Ext 1417; [1918] AC 888 at p 894:

> A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail; ... where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined ...

[76] Likewise in the instant appeals, we find that:

(a) the circumstances that had given rise to the issuance of the MIC's letter dated 5 February 2015 and whether the letter had any nexus to the ROS's letter dated 31 December 2014 threatening cancellation of the MIC's registration;

(b) whether the ROS's letter dated 6 February 2015 merely echoed the MIC's letter dated 5 February 2015;

(c) whether or not the ROS had conducted his own investigation and acted independently or whether his decision was tainted with biasness in favour of the first defendant's faction;

(d) whether the eighth defendant was in fact partisan in favour of the first defendant;

(e) whether there was misfeasance in public office by the seventh and eighth defendants; and

(f) whether or not there was fraud or deception practised on the court in the JR applications,

are questions of facts which should be fought out and determined at full trial.

[77] To conclude, we find that the fresh action is not a plain and obvious case for striking out and the learned judge's error in failing to give due regard to the

nature of the plaintiffs' claim under s 44 of the EA warrants our appellate intervention. We therefore allow the appeals with costs and we set aside the orders of the High Court. The fresh action is remitted to the High Court for trial.

Appeals allowed with costs; orders of High Court set aside.

Reported by Afiq Mohamad